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UNITED STATES v. MEZZANATTO: EFFECTIVELY DENYING YET ANOTHER PROCEDURAL SAFEGUARD TO “INNOCENT” DEFENDANTS

I. INTRODUCTION

In 1938, the United States Supreme Court decided that the right to counsel guaranteed by the Sixth Amendment to the Constitution could be waived by a criminal defendant, if such a defendant made a knowing and voluntary waiver.¹ Since that decision, waivers of other provisions created to protect defendants, both constitutional and statutory,² have been upheld to the relief of prosecutors who must face the challenge of increasing numbers of cases and a potentially overwhelming burden if more cases must go to trial.³

In a recent decision expanding the waiver of rules⁴ protecting the accused, the Supreme Court in *United States v. Mezzanatto*⁵ held that defendants who engage in plea negotiations or proffers have the ability to voluntarily waive the

1. See *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938).

2. See *Peretz v. United States*, 501 U.S. 923, 937 (1991) (providing that a defendant may implicitly waive his right to an Article III judge at voir dire if he fails to object to the functioning of a Magistrate); see also *Ricketts v. Adamson*, 483 U.S. 1, 10 (1987) (explaining that a pretrial agreement which waived the defendant's ability to claim double jeopardy as a bar to action in the event of his breach of a plea agreement was valid); see, e.g., *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (affirming that a defendant who pleads guilty to a criminal trial waives many constitutional rights including the right against self-incrimination as guaranteed by the Fifth Amendment, the right to trial by jury as guaranteed by the Sixth Amendment, and the right to confront accusers as guaranteed by the Sixth Amendment).

3. See *Santobello v. New York*, 404 U.S. 257, 260-61 (1971). The effect of a full scale trial for every criminal charged would be a requirement to multiply the number of judges and court facilities many times. Plea bargains which result in convictions are essential and beneficial as they result in finality, minimize the effect on those who must await trial in confinement, minimize continued criminal activity by those released on bail, and enhance rehabilitation for those who become incarcerated. See *id.* See also Terence Dunworth & Charles D. Weisselberg, *Felony Cases and the Federal Courts: The Guidelines Experience*, 66 S. CAL. L. REV. 99, 109-10 (1992) (explaining that currently 85% to 90% of convictions occur as a result of guilty pleas and a decrease of 5% would translate into 33% to 50% more trials).

4. Federal Rule of Criminal Procedure 11(e)(6) and Federal Rule of Evidence 410 are substantially the same. Federal Rule of Criminal Procedure 11(e)(6) provides:

Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: (A) a plea of guilty which was later withdrawn; (B) a plea of nolo contendere; (C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or (D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

FED. R. CRIM. P. 11(e)(6).

5. *United States v. Mezzanatto*, 115 S. Ct. 797, 800 (1995).

protection against later use of their statements for the purpose of impeachment.⁶ The *Mezzanatto* Court, which settled a split among the courts of appeals,⁷ examined the legislative intent of the drafters of the rules and determined that the waiver of the protection afforded by the rules was consistent with Congress' intent to encourage early settlement.⁸

This note considers the potential impact of the Supreme Court's decision on the current system of plea bargaining. Additionally, by examining the characteristics of the plea bargain within the context of its similarity with other contractual negotiations, and the proffer and negotiation within the context of bargaining theory, the effect of this ruling will be seen as a significant detriment to the liberty interests of criminal defendants. The holding of the *Mezzanatto* Court, which failed to appreciate the substantial limitation placed on defendants who can now essentially be compelled to waive protective rights, forgoes the stated intent of the rules and should be reconsidered, mandating a bright line rule against the waiver of plea negotiation protective rules.

II. STATEMENT OF THE CASE

A. Facts

In August of 1991, Gordon Shuster was arrested for intent to produce methamphetamine in the laboratory located in his home.⁹ Shuster agreed to cooperate with the San Diego Narcotics Task Force agents and subsequently arranged for the purchase of methamphetamine from Gary Mezzanatto.¹⁰ At

6. See *id.* at 801.

7. The Seventh Circuit Court of Appeals stood in clear support for allowing waiver of the protection against impeachment in plea negotiations. See, e.g., *United States v. Maldonado*, 38 F.3d 936, 942 (7th Cir. 1994) (arguing that the government can use the defendant's proffer statement for impeachment if the defendant has signed a proper waiver form), *cert. denied*, 116 S. Ct. 933 (1995); *United States v. Dortch*, 5 F.3d 1056, 1069 (7th Cir. 1993) (arguing that if a defendant provides or elicits testimony which is "materially different" from that of his proffer, the prosecution may use his proffer statements against him for impeachment if defendant signed a waiver), *cert. denied*, 114 S. Ct. 1077 (1994), and *cert. denied sub nom. Suess v. United States*, 115 S. Ct. 933 (1995). The Second, Eighth, Ninth, and Tenth Circuit Courts of Appeals had indicated in dicta that admission of plea negotiation statements for impeachment should not be allowed. See, e.g., *United States v. Acosta-Ballardo*, 8 F.3d 1532, 1536 (10th Cir. 1993) (explaining that statements made during plea negotiations should not be admitted, agreeing with the Ninth Circuit, notwithstanding a valid waiver); *United States v. Lawson*, 683 F.2d 688, 693 (2d Cir. 1982) (explaining that the legislative history of the Federal Rule of Evidence 410 indicates with clarity that statements of the defendant made during plea negotiations should not be used for prosecution's case in chief or impeachment); *United States v. Verdoorn*, 528 F.2d 103, 107 (8th Cir. 1976) (recognizing plea bargaining as essential and the element of confidentiality of plea offers in unsuccessful plea bargains as critical to fostering "meaningful dialogue"). The District of Columbia, Fifth, and Eleventh Circuit Courts of Appeals had not addressed the issue of waiver, but had indicated in dicta that waiver of the provisions of the plea bargain rules should not be allowed. See, e.g., *United States v. Wood*, 879 F.2d 927, 937 (D.C. Cir. 1989) (commenting that although not directly ruling on the issue of waiver, the court recognizes that the candid defendant should not be prosecuted for statements made in plea negotiations); *United States v. Rogers*, 848 F.2d 166, 169 (11th Cir. 1988) (invalidating defendants' ability to waive the Rule 11(e)(6) bar to admission of plea statements when those statements benefit the defendant).

8. See *Mezzanatto*, 115 S. Ct. at 803.

9. See *id.* at 800.

10. See *id.*

the meeting during which Shuster introduced an undercover law enforcement officer to Mezzanatto, Mezzanatto sold a quantity of methamphetamine to the officer and, following the transaction, was arrested and charged with a violation of a federal statute.¹¹

Following his arrest, Mezzanatto and his attorney sought a meeting with prosecutors to explore cooperating in exchange for a lesser charge.¹² As a preliminary condition to the negotiation, the prosecutor required Mezzanatto to agree that inconsistent statements could be used against him at trial if he were not candid during the negotiation.¹³ The prosecutor further explained that failure to be truthful would result in the termination of plea bargaining.¹⁴ After consulting with his attorney, Mezzanatto formally accepted the imposed condition.¹⁵

The negotiation lasted less than one hour.¹⁶ During that time, Mezzanatto admitted knowing that Shuster had been manufacturing methamphetamine.¹⁷ Mezzanatto attempted to downplay his involvement and knowledge of the conspiracy by initially stating that he had not been to Shuster's home for several days prior to his arrest.¹⁸ The prosecutor then contradicted Mezzanatto's assertion with documented evidence of Mezzanatto's presence on Shuster's property the day prior to his arrest.¹⁹ The prosecutor then ended the negotiation by invoking the condition that Mezzanatto be truthful and candid.²⁰

Mezzanatto was subsequently tried for possession of methamphetamine.²¹ While testifying in his own defense, Mezzanatto denied several of the facts which he had admitted during his plea negotiation.²² Although defense counsel objected, the prosecutor introduced Mezzanatto's prior statements made during the plea negotiation to impeach him.²³ The jury returned a guilty verdict, and Mezzanatto was sentenced to over 14 years in prison followed by five years of supervised release.²⁴ Mezzanatto appealed this decision to the Ninth Circuit Court of Appeals.

B. The Ninth Circuit Court of Appeals' Decision

A three judge panel of the Ninth Circuit Court of Appeals undertook a de novo review of the District Court's decision allowing waiver of Federal Rule of

11. *See id.*

12. *See id.*

13. *See id.*

14. *See id.*

15. *See id.*

16. *See* Brief for Respondent at 1, *United States v. Mezzanatto*, 115 S. Ct. 797 (1995) (No. 93-1340).

17. *See Mezzanatto*, 115 S. Ct. at 800.

18. *See id.*

19. *See id.*

20. *See id.*

21. *See id.* The charge was possession of methamphetamine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) (1994).

22. *See United States v. Mezzanatto*, 998 F.2d 1452, 1453 (9th Cir. 1993), *rev'd*, 115 S. Ct. 797 (1995).

23. *See id.*

24. *See id.*

Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6).²⁵ The court began its analysis by examining the scope of the rules. In its initial observation, the court clearly noted that statements made during plea negotiations may not be used in later prosecutions unless one of two explicit exceptions apply.²⁶ The court examined the legislative history of the rules to find support for its unwillingness to recognize the waiver and the resultant use of the statements made by the defendant for impeachment.²⁷

The court interpreted the versions of the rules which had been proposed but not enacted as evidence that Congress specifically intended that impeachment not be expanded.²⁸ It observed permissive impeachment language originally included in the Senate amendment but not included in the final text of the rules, and noted that commentators and other circuits support this exclusion as an interpretation of legislative intent.²⁹ The court reasoned that the specificity of the rules governing plea negotiations indicate that if a waiver is not clearly provided, a waiver was not intended and thus should not be allowed by the courts.³⁰

The court next considered the policy arguments against waiver in the context of the value of plea negotiation in the criminal justice system. Initially, the court pointed out the policy advantages: that negotiated pleas are more expedient and more cost-efficient than trial.³¹ The court further emphasized the value of frankness and its relation to effective plea bargaining. The court recognized the value of the protective rules in promoting the desired candor during plea negotiations.³² The court concluded that the elimination of the threat of prosecutors using the defendant's statements for impeachment is positive motivation to suspects involved in conspiracies, who will be more likely to give valuable information leading to the identification and prosecution of more consequential members.³³

The court noted that defendants who are willing to fully cooperate are in a better bargaining position to obtain a more favorable disposition of their individual case.³⁴ The court observed that many defendants would be unwilling to provide information which is critical to the prosecution of other members of

25. *See id.*

26. *See id.* at 1454; *see also* FED. R. CRIM. P. 11(e)(6). The two exceptions are instances in which the defendant introduces a statement he made during the plea negotiation and the instance in which the defendant is tried for perjury in a separate proceeding.

27. *See Mezzanatto*, 998 F.2d at 1454.

28. *See id.*

29. *See* H.R. CONF. REP. No. 94-414, at 10 (1975), *reprinted in* 1975 U.S.C.C.A.N. 713, 714; *see also* *United States v. Lawson*, 683 F.2d 688, 692-93 (2d Cir. 1982) (explaining the reluctance of the House of Representatives to pass an amendment to allow admission of statements for impeachment); *United States v. Martinez*, 536 F.2d 1107, 1108 (5th Cir. 1976) (*per curiam*) (arguing that the defendant's statements were erroneously allowed for impeachment due to confusion regarding the effective date of the amended rule).

30. *See Mezzanatto*, 998 F.2d at 1454-56.

31. *See id.* at 1454.

32. *See id.*

33. *See id.* at 1455.

34. *See id.*

conspiracies, without the possibility of creating a better situation for themselves.³⁵

III. THE SEVENTH CIRCUIT COURT OF APPEALS' VIEW

The view taken by the Ninth Circuit was not exemplary of a uniform rational employed in cases dealing with plea negotiations. Two months after the Ninth Circuit decided *Mezzanatto*, the Seventh Circuit proclaimed a directly contrary view toward the issue of waiver in *United States v. Dortch*.³⁶

A. Facts of the Case

The prosecution of the *Dortch* case was undertaken in response to activities of the "Windtramps Motorcycle Club," which included the marketing of various types of drugs and weapons.³⁷ As a result of an extensive investigation, conspiracy charges were brought against nine defendants.³⁸

One of the defendants, Wilhelm Suess, made incriminating statements as part of a proffer to prosecutors to cooperate in exchange for a negotiated plea.³⁹ Prior to making these statements, Suess had signed a prepared, standard form waiver of his rights against further use of his statements at trial.⁴⁰ The negotiation ended without the parties reaching an agreement, and Suess went to trial for his participation in the conspiracy.⁴¹

At his trial, Suess called a witness whose testimony on direct examination contained information which was contrary to statements made by Suess and the witness during their respective plea negotiations.⁴² Over defense counsel's objection, the trial court allowed the statements made by Suess to rebut the defense witness.⁴³

B. Issue of Waiver on Appeal

The Seventh Circuit Court of Appeals relied upon a previous Seventh Circuit holding to provide the rule that a defendant's signed proffer precludes her from objecting to admission of statements for impeachment.⁴⁴ Applying this rule to the facts of the case, the court noted that the specific language of the proffer statement initialed and signed by Suess indicated exactly what would

35. *See id.*

36. 5 F.3d 1056, 1069 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1077 (1994), and *cert. denied sub nom.* Suess v. United States, 115 S. Ct. 933 (1995).

37. *See id.* at 1058.

38. *See id.* at 1059.

39. *See id.* at 1067.

40. *See id.* at 1067-68 n.9.

41. *See id.* at 1067.

42. *See id.*

43. *See id.*

44. *See id.* at 1068; *see also* United States v. Goodapple, 958 F.2d 1402, 1409 (7th Cir. 1992).

happen if Suess tendered contrary testimony.⁴⁵ Recognizing the deterrent effect that such a waiver would have on plea bargaining if defendants' statements are used in a later prosecution, the court noted that the waiver letter signed prior to any statements by the defendant informs the defendant of the consequences.⁴⁶

The court rejected the argument that defendants are placed in an untenable position due to the requirement that the waiver must be signed as a precondition to plea discussions.⁴⁷ Noting that waivers of many constitutional rights are allowed, the court pragmatically pointed out that an additional protection is present because the decision to waive rights is normally undertaken on advice of counsel.⁴⁸ The court also noted that defendants cannot be "harmed" by their statements unless they later change the content of their testimony, which is consistent with the policy of finding the truth.⁴⁹

The court's holding extended the policy of waiver not only to allow statements made by the defendant to impeach himself or herself, but also to impeach the defendant's witness.⁵⁰ The Seventh Circuit provided a warning as it concluded that the defendant who calls a witness is appropriately placed in jeopardy of having his own proffer statements exposed.⁵¹

IV. DECISION OF THE SUPREME COURT

While the Supreme Court heard *Mezzanatto* to settle the split in the Circuit Courts represented by *Mezzanatto* and *Dortch*, the specific facts of the *Mezzanatto* case were virtually ignored in the analysis conducted by the Court. Justice Thomas, writing for the majority, instead focused upon the underpinnings of the rule to determine that the protective rules should be waivable.

45. See *Dortch*, 5 F.3d at 1067.

46. See *id.* at 1067-68. The proffer letter initialed by Suess and his attorney provided in part: Fourth, the government may use any statements made or other information provided by your client to rebut evidence or arguments materially different from any statements made or other information provided by your client. This provision is necessary to assure that no court or jury is misled by receiving information materially different from that provided by your client. In addition, we want to emphasize that the above mentioned examples are not totally inclusive of the uses the government may make of your client's "off-the-record" proffer or discussion.

Id. at 1067-68 n.9; see also *United States v. Floyd*, 1 F.3d 867, 868-69 n.1 (9th Cir. 1993) (providing explicit warning of consequences to defendant); *United States v. Reardon*, 787 F.2d 512, 515-16 (10th Cir. 1986) (providing plea agreement mandating cooperating with F.B.I agents).

47. See *Dortch*, 5 F.3d at 1068-69.

48. See *id.* at 1069.

49. See *id.*

50. See *id.*

51. See *id.* Although the witness was testifying on behalf of several defendants, the witness was called by Suess, and his counsel was perceived as extracting the inconsistent statements. The court stated:

In such a situation, we do not believe that the defendant should be able to evade the agreement he made . . . solely because he did not take the stand. Instead . . . the defendant must choose whether to protect the proffer by carefully determining which lines of questioning to pursue with different witnesses.

Id.

A. Presumptions

The Court pointed out that there is a recognized assumption that a criminal defendant can waive protective provisions if that defendant does so within the judicially construed requirements of a knowing and voluntary decision.⁵² In contrast to the rule examined in this case, the Court indicated that other federal rules of criminal procedure are expressly waivable, and that if a waiver is expressly provided by the rule, other forms of implied waivers may be precluded.⁵³ Conversely, the Court indicated its willingness to enforce agreements to waive procedures regardless of the existence of an express waiver provision or the significance which attaches to the non-existence of such a provision.⁵⁴ The Court observed that parties will frequently stipulate to the waiver of certain evidentiary rules, and courts will generally allow the stipulation, recognizing that such tactics are common tools.⁵⁵

B. Majority Opinion

The majority of seven Justices dismissed the three arguments set forth by Mezzanatto for denying the admissibility of plea negotiation statements for later impeachment.⁵⁶ First, Mezzanatto advanced the theory that the federal plea bargain rules provide an assurance that the defendant will receive procedural fairness, and that therefore, a defendant should not be permitted to waive these prophylactic rules.⁵⁷ The Court distinguished the federal plea bargaining rules from other rules which are so critical to protecting the integrity of the truth seeking function that waiver is precluded.⁵⁸ Additionally, the majority reasoned that rather than undermining the criminal justice system, the admission of plea statements ensures reliable, and hence correct, verdicts.⁵⁹ The majority further

52. See *United States v. Mezzanatto*, 115 S. Ct. 797, 801 (1995); see also *Peretz v. United States*, 501 U.S. 923, 936 (1991) ("The most basic rights of criminal defendants are similarly subject to waiver."); *Ricketts v. Adamson*, 483 U.S. 1, 10 (1987) (establishing that double jeopardy rights are waivable by pre-trial agreement); *Evans v. Jeff D.*, 475 U.S. 717, 730-32 (1986) (explaining that the waiver of attorney fees by a victorious plaintiff in a civil rights action is within contemplation of Congress in that by allowing waiver, the fees could become a bargaining tool to promote settlement); *Boykin v. Alabama*, 395 U.S. 238, 242-243 (1969) (holding that a guilty plea involves waiver of constitutional provisions against compulsory incrimination, right to jury trial, and right to confront accusers; affirmative evidence of waiver is required to withstand scrutiny of voluntariness); *Shutte v. Thompson*, 82 U.S. (15 Wall.) 151, 159 (1873) (announcing that generally a person can waive any provision of a contract or statute).

53. See *Mezzanatto*, 115 S. Ct. at 801-02; see also *Crosby v. United States*, 506 U.S. 255, 258-59 (1993):

The Rule [43] declares explicitly: "The defendant shall be present . . . at every stage of the trial . . . except as otherwise provided by this rule." The list of situations in which the trial may proceed without the defendant is marked as exclusive not by the "expression of one" circumstance, but rather by the express use of a limiting phrase.

See also *Smith v. United States*, 360 U.S. 1, 9 (1959) ("Rule 7(a) recognizes that this safeguard [indictment requirement] may be waived, but only in those proceedings which are noncapital.")

54. See *Mezzanatto*, 115 S. Ct. at 802; see also 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5039 (1977).

55. See *Mezzanatto*, 115 S. Ct. at 802.

56. See *id.* at 803.

57. See *id.*

58. See *id.*

59. See *id.*

reasoned that truthfulness of the defendant's statements, or the lack thereof, is the defendant's responsibility and peril.⁶⁰

Second, Mezzanatto asserted that waiver is contrary to the goal of the rules in promoting early settlement.⁶¹ The Court responded to this argument by focusing on the underrepresented interests of the prosecutor, pointing out that while the defendant may be reluctant to enter into plea negotiations without the rule in place, the prosecutor could also be deterred from entering into plea negotiations unless a prerequisite waiver is obtained.⁶² The majority dismissed Mezzanatto's argument because he failed to present any empirical evidence that plea bargaining has been, or will be, adversely affected by the standard practice of requiring a waiver.⁶³

Finally, Mezzanatto pointed to the potential for governmental abuse if waiver is allowed to be used as a negotiation tool by the prosecutor.⁶⁴ The Court concluded that on this issue there is a general presumption that prosecutors will act responsibly within the limits of their prescribed power.⁶⁵ Further, the dilemma presented to the defendant, of choosing between proceeding with the plea discussion by waiving the protection afforded by the rule and forgoing the plea negotiation option altogether, is viewed as a tolerable condition by the majority, and not unlike other difficult choices regularly faced by a criminal defendant.⁶⁶

After dismissing Mezzanatto's arguments, the majority rested its argument on the presumption of waivable provisions in the Federal Rules of Criminal Procedure.⁶⁷ With this presumption firmly implanted in the majority's rationale, the Court established that even Congressional silence on the matter would not conclusively persuade the Court to reject the idea that waiver is possible, absent affirmative argument for a rejection of the presumption.⁶⁸ As the majority effectively rejected Mezzanatto's argument, the Court similarly rejected the Ninth Circuit's "per se rejection of waiver of the plea-statement Rules."⁶⁹

60. *See id.*

Under any view of the evidence, the defendant has made a false statement, either to the prosecutor during the plea discussion or to the jury at trial; making the jury aware of the inconsistency will tend to increase the reliability of the verdict without risking institutional harm to the federal courts.

Id.

61. *See id.* at 804.

62. *See id.*

63. *See id.* at 805 n.6.

64. *See id.* at 805.

65. *See id.* at 806; *see Town of Newton v. Rumery*, 480 U.S. 386, 397 (1987) (plurality opinion) ("[T]radition and experience justify our belief that the great majority of prosecutors will be faithful to their duty."); *see also United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.").

66. *See Mezzanatto*, 115 S. Ct. at 805-06; *see also Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("[B]y tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.").

67. *See Mezzanatto*, 115 S. Ct. at 806.

68. *See id.* at 803.

69. *Id.*

C. *The Dissent*

The decision sparked a dissent by Justice Souter and Justice Stevens. From their perspective, the relevant question was whether Congress intended to allow the waiver when Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11 were passed.⁷⁰ The dissenters pointed out that in a matter such as this one, in which the intent of Congress and the interpretation of the rules by the courts conflict, Congressional intent must prevail.⁷¹ Within this context, the dissent perceived that the interpretation of the rules in the manner adopted by the majority to be in conflict with the intent of Congress, and potentially resulting in the rules becoming “dead letters.”⁷²

The dissenters examined evidence that Congress impliedly intended to preclude waiver. The Advisory Committee Notes accompanying the rules were highlighted as determinative that the rule was not intended to be waived.⁷³ From its analysis of the Advisory Committee’s statements, the dissent concluded that Congress likely established two values: plea bargains are an encourageable solution, and facilitating truthfulness will result in more plea bargains.⁷⁴ From this premise, the dissent concluded that the right created by the rules is not a personal right; rather, the rules were designed to protect the federal judicial system by creating an atmosphere conducive to resolving cases through compromise.⁷⁵ The dissent further emphasized that if this premise is accepted, the clarity of Congressional intent indicates that the legislators could not have foreseen or intended to limit the qualities of candidness and openness, which are key elements to facilitate the stated goal of the rules.⁷⁶ The dissent also carefully pointed out that although the method adopted by Congress in valuing compromise over a vigorous adversary system may not be the exclusive answer to what the balance should be, and although enough cases might end in a plea agreement under the majority’s holding, Congressional intent must be followed as a matter of course.⁷⁷

Concluding their argument, the dissenters forecasted that allowing the waiver would have an adverse impact on the protective quality of the rules.⁷⁸ As evidence of the consequences of allowing the waiver, the dissenters pointed out that at the time of the decision, requiring defendants to sign a boilerplate waiver when those defendants are typically in no position to reject the requirement acts to negate any prophylactic effect of the rule.⁷⁹ The resultant “adhesion contract” was predicted to be inevitable if waiver of the rules is

70. *See id.* at 806.

71. *See id.*

72. *Id.* at 806.

73. *See id.* at 807.

74. *See id.* at 807-08.

75. *See id.* at 808.

76. *See id.*

77. *See id.*

78. *See id.* at 809.

79. *See id.*

allowed.⁸⁰ Furthermore, a slippery slope of conditional waivers was forewarned. The required waiver of plea statements for impeachment use might lead prosecutors to require, as a condition of continued discussion, waiver of the defendant's protection of use of the statements for the prosecution's case in chief.⁸¹ There is, the dissent pointed out, "no legitimate limit" to use of the statements.⁸² The result foreseen is that the only defendant who will engage in candid plea negotiations will be that defendant who is in such an untenable position that the only alternative to plea negotiation is to enter a guilty plea at the outset.⁸³

V. THE MECHANICS OF THE PLEA BARGAIN

The majority opinion expressed concern with the interpretation of Congressional intent by the Ninth Circuit Court of Appeals, but neglected to discuss the poignant and relevant public policy argument presented by the respondent in his brief to the Court.⁸⁴ The failure of the Court to consider the specific qualities of the plea negotiation, and the nuances and similarities of the resultant plea bargain to other contracts,⁸⁵ undermines the majority's public policy interpretation of the Federal Rules, the basis of its opinion.⁸⁶ The contract principles which address the disparity of bargaining power and its consequence to the agreement which may be reached were not addressed by Justice Thomas' majority opinion. In failing to appreciate the system of plea bargaining in the federal courts, the Court ignored the claims of defendants who can now be compelled to waive their plea-statement protections and further reduce their bargaining power.

A. Problems in Contract Formation and the Plea Bargain

As a contract which affects both the societal interest of punishing the guilty at a reduced overall cost and the individual interests of reduction of prison sentences, the plea bargain can be recognized as the product of an offer and an acceptance of the offer within the constraints of the due process rights of the defendant.⁸⁷ A plea bargain is normally initiated by an informal meeting

80. *See id.*

81. *See id.* at 809.

82. *See id.*

83. *See id.*

84. Brief for Respondent at 20, *Mezzanatto*, (No. 93-1340).

85. *See* Po Yin Sit, Note, *Double Jeopardy, Due Process, and the Breach of Plea Agreements*, 87 COLUM. L. REV. 142, 143 (1987); *see also* United States v. Calabrese, 645 F.2d 1379, 1390 (10th Cir. 1981) (noting that courts often apply contract principles to plea negotiation violations); *compare* 21 WRIGHT & GRAHAM, *supra* note 54, at § 5039 (discussing contracts to alter rules of evidence).

86. *See* Andrew E. Taslitz, *Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 HARV. J. ON LEGIS. 329, 351-52 (1995). Professor Taslitz asserts that the majority and dissent in *Mezzanatto* engaged in a search of legislative history to provide interpretation of the rule, but found that the Advisory Committee Notes only served to provide policy arguments for the rule. He perceives that the majority and the dissent's focus upon the "central question . . . whether waiver would or would not serve those policy goals." *Id.* at 351-52.

87. *See* Sit, *supra* note 85, at 143. Through the process of plea bargains, the state may lose its ability to

in which the defendant and the prosecutor will discuss the possibility of a mutually beneficial arrangement, or plea bargain.⁸⁸ In the federal courts, the defendant will be required to submit a proffer, which results in the initial determination of the extent of the defendant's value to, and bargaining power vis-a-vis, the prosecutor.⁸⁹ Many proffers are conditioned upon a promise of truthfulness.⁹⁰ Because the prosecutor's acceptance of the defendant's proffer could result in a reduction of the sentence awarded to that defendant, the defendant faces a crucial decision when making the proffer.⁹¹ If the initial proffer is not acceptable, the defendant has little or no chance to modify the information conveyed.⁹² If the proffer is sufficient to motivate the prosecutor to enter into plea negotiations, the defendant is then required to maintain the validity of the proffer by continuing a flow of consistent information, even if the result is to continue to convey false information.⁹³ Once the proffer is accepted by the prosecutor, terms are undertaken which may result in a guilty plea, a beneficial sentencing recommendation, or a lesser charge, in exchange for testimony against a third party, information assisting ongoing investigations, or an agreement to actively assist in an investigation.⁹⁴

B. Enforcement Problems and Plea Bargains

The resulting contract or plea bargain is considered an adhesion contract by many commentators, since the parties enter the negotiation with a wide disparity of bargaining power.⁹⁵ Courts have been willing to enforce such plea

reprosecute defendants who breach a plea agreement. The resulting immunity from prosecution may cause the state to be hesitant to extend the offer of a plea bargain if it would result in such a disparate arrangement. Alternatively, the defendant may be less willing to plead guilty if reprosecution for a more serious related charge is forthcoming. For this reason, "plea agreements should be seen as constitutionally sensitive contracts, involving not only the contractual rights of defendants, but their due process and double jeopardy interests as well." *Id.*

88. See Brief for Respondent at 20-21 n.15, *Mezzanatto* (No. 93-1340). "[A] proffer describes the defendant's offer of information to the government. This offer is made by the defendant in the hope that he will ultimately receive some consideration for his information and cooperation." *Id.*

89. See *id.* at 21.

90. See, e.g., *United States v. Dortch*, 5 F.3d 1056, 1067-68 n.9 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1077 (1994), and *cert. denied sub nom. Suess v. United States*, 115 S. Ct. 933 (1995). For an example of a proffer agreement which is in use in the Federal District Court for the Eastern District of New York, see Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1 (1992). The agreement provides in part:

Should it be judged by the Office that [the cooperator] has failed to cooperate fully, or has intentionally given false, misleading or incomplete information or testimony . . . [he] shall thereafter be subject to prosecution for any federal criminal violation of which the Office has knowledge, including, but not limited to, perjury and obstruction of justice.

Id. at 38 n.144.

91. See Brief for Respondent at 21, *Mezzanatto* (No. 93-1340).

92. See Hughes, *supra* note 90, at 39.

93. See *id.* The requirement that the proffer and the expected information to be presented at trial for the purpose of convicting a third party creates a significant "dilemma" in the defendant. "The intractable problem is that a witness may lie or make mistakes in the proffer, and the conditions as to truthfulness may serve as the strongest inducement for the witness to perpetuate the lie or not to retract the mistake." *Id.*

94. See Meredith Kolski, *Guilty Pleas*, 82 GEO. L.J. 926, 927 (1994).

95. See Hughes, *supra* note 90. The prosecutor is in a clearly advantageous position. There is currently no judicial method for compelling a prosecutor to proceed in a case against a suspect who has not been charged. The discretion of the prosecutor to treat one defendant more or less benevolently depending upon the

agreements, although the nature of the plea bargain raises concerns in the area of contract law which deals with enforceability.⁹⁶

1. Duress as a Bar to Enforcement

The coercive effect of the prosecutor's superior bargaining position can result in the contract being unenforceable.⁹⁷ In the context of contract law, a contract is unenforceable due to duress when the defending party can prove she would not have entered into the agreement if the opposing party had not produced an improper coercive effect which compelled the party's acquiescence.⁹⁸ Within a plea bargain context, the inherent disparity between actual post-trial sentences and the potentially reduced sentence following a negotiated plea agreement can result in a dilemma in which the defendant is "forced" to plea bargain.⁹⁹ Consequently, the acceptance of a resultant guilty plea within the context of a coercive environment is contrary to the requirement of a voluntary waiver of constitutional protections.¹⁰⁰

2. Unconscionability as a Bar to Enforcement

If a plea bargain is not recognized as meeting the requirements for unenforceability under the theory of duress, the doctrine of unconscionability may be applied.¹⁰¹ The doctrine focuses upon the "quality of the bargain" obtained and may arise as one of two distinct types, substantive or procedural.¹⁰²

utility of the particular defendant's information is a common technique in prosecutorial plea bargaining. "This is the source of the [prosecutor's] power." *Id.* at 12.

96. See Hughes, *supra* note 90, at 17.

97. See Sit, *supra* note 85 at 144; but see Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1923-24 (1992) The plea bargain is outside the classification of adhesion contracts as the prosecutor may appear to be in a superior bargaining position, but is limited by the defendant's ability to "call" the prosecutor, forcing the government to prove its case. See *id.* This power in the defendant "motivates the prosecutors to bargain—not simply to make offers and walk away." *Id.* The prosecutors are thus placed in a position in which they are not required to make a set offer to every defendant, but it is to their advantage to make an offer to every defendant. See *id.*

98. See Scott & Stuntz, *supra* note 97, at 1919.

99. See Brief for Respondent at 25-26, *Mezzanatto* (No. 93-1340) (arguing that the waiver of the protection against the use of proffer statements for impeachment is coercive as a precondition to a negotiation with the government. Requiring defendants to sacrifice their defense when faced with substantial minimum sentences is coercive). But see Scott & Stuntz, *supra* note 97, at 1920-21. The pressure created by the disparity of potential sentences upon the defendant is a result of the minimum sentences, not the actions of the prosecutor. Without manipulative action on the part of the prosecutor, the voluntariness of the defendant who enters into the plea agreement is not jeopardized. *Id.*

100. See *Colorado v. Spring*, 479 U.S. 564, 572-73 (1987) (arguing that the Fifth Amendment right against self-incrimination may be relinquished if the totality of the circumstances indicate that the defendant gave up the right "voluntarily, knowingly and intelligently." Further, voluntary is defined as a waiver free from "intimidation, coercion, or deception"). See also FED. R. CRIM. P. 11(d).

The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

Id.

101. Scott & Stuntz, *supra* note 97, at 1921.

102. See *id.*

Substantive unconscionability relates to the terms of the actual agreement.¹⁰³ The nature of a simple plea bargain in which the defendant agrees to plead guilty for the government's promise to recommend a lower sentence or seek a lower charge, precludes the existence of substantive unconscionability, as the defendant receives exactly what is expected.¹⁰⁴ Procedural unconscionability, then, is the only type which could interfere with the enforcement of a plea agreement. As plea bargains become more complex, involving more conditions placed upon the defendant in exchange for the government's promise, procedural unconscionability becomes an even more realistic possibility.¹⁰⁵

Procedural unconscionability focuses upon the limitations on a party's capability to rationally evaluate the terms of the contract prior to acceptance.¹⁰⁶ The qualities of market unresponsiveness or disparate bargaining power particularly manifest when one party is placed in a position which requires that party to agree to standard form, non negotiable terms.¹⁰⁷ This problem is most often thought to arise in the case of a producer of mass marketed goods and an individual buyer.¹⁰⁸ While the buyer has very little impact upon the seller's profit, the goods which the seller is marketing may be of significant value to the buyer.¹⁰⁹

Similarly in plea agreements, the use of the standard form terms used in many jurisdictions and the federal criminal justice system present the possibility of a procedurally unconscionable agreement.¹¹⁰ The plea agreement offered to a defendant as the only alternative to facing a trial appears to present that defendant with the classic "take it or leave it" option.¹¹¹ Some commentators believe that the defendant's right to force the government to prove their case at trial is the equalizing factor which compels the prosecutor to actually bargain, rather than make a single offer and demand an inflexible response.¹¹²

103. *See id.*

104. *See id.*

105. *See id.* at 1921. The substantive unconscionability claim is often negated in the plea bargain scenario as the terms which the defendant bargained for, either a lesser charge, sentencing recommendation, or charged being dropped, are delivered by the prosecutor. The procedural unconscionability suggested consists of two types. First, the information based argument relies upon the complexity of the terms and their effect upon the contracting party. Secondly, market unresponsiveness or disparate bargaining power can thrust a contract into unenforceability. *Id.* at 1922-23.

106. *See id.* at 1921.

107. *See id.* at 1923.

108. *See id.* at 1924.

109. *See id.*

110. *See generally* Hughes, *supra* note 90, at 35 n.136 (citing 5 Crim. Prac. Man. (BNA) 11 (1991)). An example of a plea in return for cooperation provides:

That the defendant agrees that he will cooperate with the police in a manner that leads to the indictment of the following four (4) individuals [individuals are then named] . . . Any indictment of [A] must be for a minimum of one (1) kilo of cocaine. If for whatever reason insufficient evidence is available to indict [B], [C] or [D], a person may be substituted for them for the purpose of this agreement. Any substitution must have the approval of the State's Attorney and must come from the organization that is being investigated.

Id.

111. *See generally* Scott & Stuntz, *supra* note 97, at 1924 (describing the "take it or leave it" style of mass market contracts).

112. *See id.*

3. Due Process Concerns and Plea Agreements

A distinctive feature of plea bargaining, which implicates the formation of plea agreements and the enforcement of those agreements as entities falling outside traditional contract limitations, is the due process rights which attend.¹¹³ Specific due process considerations are addressed in the requirement in Federal Rule of Criminal Procedure 11(d), which requires the defendant who is entering a plea as a result of a plea bargain to appear before the judge.¹¹⁴ The judge is then charged with the responsibility of determining if the plea was made voluntarily and intelligently.¹¹⁵ Additionally, requirements such as that the defendant's testimony must directly contribute to the conviction of a third party clearly enumerates the government's expectation with regard to the quality of the testimony sought.¹¹⁶ The resultant pressure upon the defendant to conform to the government's expectations may cause the testimony to be less than truthful, in fact, requiring the defendant to lie in order to conform to his previous proffer.¹¹⁷ The addition of due process considerations imposes greater responsibility upon the government to ensure that the defendant's interests are protected.¹¹⁸

As a general proposition, the critical element in the consideration of the plea bargain is the idea of fairness provided to the defendant throughout the process. The majority opinion in *Mezzanatto* denied that the defendant was placed in any worse bargaining position as a result of waiving plea-statement protection as a precondition to negotiations.¹¹⁹ In order to explore the fallacy of this approach, the dynamics of the plea negotiation itself must be examined to determine the consequences of one party giving up bargaining power in a plea negotiation.

VI. ETHICS AND THE DYNAMICS OF THE PLEA NEGOTIATION

The Supreme Court's approach to waiver of plea-statement protections differed from that of the Ninth Circuit in that the majority ostensibly considered the defendant's decision to waive plea-statement rules from the perspective of protecting prosecutorial rights.¹²⁰ The preconditioned waiver of plea-statement protections impacts significantly on the resulting plea agreement, a product of

113. See *Sit*, *supra* note 85, at 145-46.

114. See FED. R. CRIM. P. 11(d). The text of this rule is located *supra* at note 100.

115. See *Santobello v. New York*, 404 U.S. 257, 261-62 (1971).

116. See *Hughes*, *supra* note 90, at 35. "The witness is being crudely told that he will get no reward unless his testimony is of a certain nature. This imposes a very high degree of pressure and influence and, thus, should render the testimony tainted." *Id.*

117. See *id.*

118. See *United States v. Calabrese*, 645 F.2d 1379, 1390 (10th Cir. 1981); see also *Santobello*, 404 U.S. at 262 (arguing that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled").

119. See *United States v. Mezzanatto*, 115 S. Ct. 797, 805 (1995).

120. See *id.* at 804. The Court noted that without the waiver of the rule, the prosecutor may be reluctant to bargain at all. See *id.*

the competing interests of the defendant and the prosecutor following a “negotiation.” For the purposes of analysis, the waiver of the defendant’s rights to be free from further use of her statements for impeachment, in exchange for the ability to continue the plea negotiation can be viewed as an independent contract. In determining whether the prosecutor’s pursuit of governmental interests results in the compulsion of the defendant’s waiver, the adversarial nature of plea negotiation is itself directly relevant.

A. *Disparity of Power in a Plea Negotiation*

In the criminal justice system, a plea agreement is usually produced to the advantage of both parties.¹²¹ The relative advantage gained by the prosecutor is a direct result of the relative bargaining power of the parties, indeed, the qualities of unequal bargaining power and a disadvantaged party are both elements in a negotiation.¹²² The relative bargaining power of the parties is related to what each party has to offer the other. For the defendant contemplating a cooperation agreement, the information regarding criminal activities of others determines bargaining power.¹²³ The prosecutor holds what can be considered either be the “sword or the shield” before the defendant. The prosecutor can either grant immunity or recommend a sentence which is lower than the potential sentence resulting from a trial, thus shielding the defendant.¹²⁴ However, the prosecutor’s tactics can also be seen as a sword, for the extent of the pressure on the defendant to continue in the plea negotiation is intense, even to the extent of “innocent defendants” pleading guilty to lesser charges to avoid a significant mandatory minimum sentence if the case should go to trial and a conviction results under a more significant charge.¹²⁵

In *Mezzanatto*, the court determined that the prosecutor, by requiring the defendant to waive his plea-statement protections as a precondition to further negotiation, was protecting the prosecutor’s interest in obtaining truthful information to be used against other suspects.¹²⁶ If the agreement to waive the rules is considered an independent contract, it should be unenforceable under the theories of duress and procedural unconscionability, due to the inherently

121. See Scott & Stuntz, *supra* note 97, at 1935. The plea bargain is entered into by both parties to save costs. For the prosecution, the cost saved is expressed in terms of time and money. For the defendant, the cost is represented by money, unless represented by a public defender, and the potential sentence if the case goes to trial. See *id.*

122. See Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493, 498 n.20 (1989).

123. See Hughes, *supra* note 90, at 39. Prof. Hughes points out that the particular criminal defendant may not have redeeming value to the prosecutor, except that the defendant’s willingness to give information may lead to the prosecution of others. See *id.*

124. See Kolski, *supra* note 94, at 927.

125. See Scott & Stuntz, *supra* note 97, at 1949. The situation of a defendant who is factually innocent is tenuous as the defendant may not be able to “signal” innocence to the prosecutor. The prosecutor is unable to perceive the high chance that the defendant will be acquitted at trial, and thus the prosecutor will offer the defendant the same deal as a guilty defendant. The innocent defendant may be more likely to accept the deal, as the large post trial sentence is so disparate from the deal offered. See *id.*

126. See *United States v. Mezzanatto*, 115 S. Ct. 797, 805 (1995).

superior bargaining power of the prosecutor, who could offer leniency or walk away. This disparity in bargaining power could compel the defendant to agree to the terms of the "contract," including the waiver of the rules.¹²⁷ The *Mezzanatto* majority failed to consider the waiver as an independent transaction and therefore failed to recognize that in almost every foreseeable instance, the defendant faced with such a decision will waive the rules protecting their statements made during the negotiation, thus circumventing the rule itself.¹²⁸

B. The Confrontational Dynamics of the Plea Negotiation

The majority in *Mezzanatto* also failed to recognize the limiting effect that its holding has on the ability of the defendant to effectively negotiate in a plea negotiation discussion. The nature of plea bargaining, as a negotiation, requires an environment in which both parties must be free to make strategic decisions regarding the information which will be conveyed.¹²⁹ The standards applied to the conduct of a plea negotiation differ from those of other civil negotiations in that the plea negotiation often produces a result in which the interests one or both of the parties will certainly not be fully realized. The confrontational nature of a plea negotiation necessarily contemplates practices such as deception being utilized on both sides.¹³⁰ Accepting the adversarial nature of the criminal justice system, the need to recognize a modified value system is apparent.¹³¹ Certainly the inherent power and skill of the parties is not to be underestimated.¹³² Additionally, the parties will engage in the strategic use of techniques such as "bluffing, puffing, and withholding information as a matter of course."¹³³

127. See *supra* notes 85-109 and accompanying text.

128. See *Mezzanatto*, 115 S. Ct. at 809 (Souter, J., dissenting). "[I]t is probably only a matter of time until the Rules are dead letters." *Id.*

129. See generally Norton, *supra* note 122, at 503. A typical negotiation is an unregulated transaction with very few standards applied to the actions of the participants. "Negotiation is dominated by process and technique, unguided by any specific consensus as to how ethical standards and norms should be applied to a process that tolerates the disguising of intentions and the use of pressure tactics." *Id.*

130. See generally *id.* at 503-04. Traditional "hard bargaining" approaches result in certain strategic actions. "Even in the most cooperative and problem-solving approaches, however, there are usually some oppositional exchanges in which deception and pressure play a role." *Id.* at 504.

131. See generally *id.* at 504-08. The system produces actions which would not be appropriate in other everyday activities. "What appears strategically sound during the course of bargaining may not be ethically or even legally appropriate." *Id.* at 506. Additionally, concerns of the truth finding aspects of negotiation and requirements placed upon the parties to a negotiation necessitate that the "ordinary ethical notions of truthfulness" not be applied. *Id.* at 508.

132. See Hughes, *supra* note 90, at 43. "Assistance of counsel, therefore, is invaluable to a defendant-potential cooperator at these early stages." *Id.*

133. See generally Norton, *supra* note 122, at 506. "Bluffing is falsely representing a position as nonnegotiable." *Id.* at n.44 "Puffing is overstating one's position, such as overvaluing one's injury claim." *Id.* at n.45; see also Hughes, *supra* note 90, at 22. The practice which is currently popular is to withhold an offer for leniency in the hope that the "continuing suspense might strengthen their [the prosecutors'] influence over the witness." *Id.*

C. Prosecutorial Use of Strategic Tactics

The Supreme Court in *Mezzanatto* pointedly emphasized the need for the prosecution to obtain a guarantee that it will have access to the absolute truth from the negotiating defendant.¹³⁴ The Court, however, failed to consider that the prosecutors are not held to the same standard of truthfulness during plea negotiations. Instead, the Court relied on the assumption that prosecutors will act within the scope of their duties.¹³⁵ In sharp contrast to this assumption, a 1985 research report from the Department of Justice's National Institute of Justice revealed that some prosecutors were routinely found to engage in bluffing, even to the extent of asserting to defendants that evidence exists when there was virtually no possibility that a conviction would result in court.¹³⁶ The report was produced from empirical research conducted in several major cities in the United States.¹³⁷ The occasions of bluffing by prosecutors typically occurred in situations in which the prosecutor had a weak case.¹³⁸ The prosecutor facing a weak case would then make assertions to the defendant that the case was significantly stronger.¹³⁹ The report concluded that approximately 81 percent of prosecutors responding to the survey would use bluffing to try to reach a plea agreement with the defendant in such a situation, even in cases with very little possibility of a conviction.¹⁴⁰

The behavior of the prosecutor in the *Mezzanatto* case illustrates the use of the bluffing technique. Mezzanatto's negotiation was convened for the ostensible purpose of exchanging Mezzanatto's information about other drug traffickers for a potentially lighter sentence.¹⁴¹ The prosecutor, having obtained a waiver of the plea-statement rules as a prerequisite to the negotiation, asked

134. See *United States v. Mezzanatto*, 115 S. Ct. 797, 804 (1995). "[P]rosecutors have limited resources and must be able to answer 'sensitive questions about the credibility of the testimony' they receive before entering into any sort of cooperation agreement." *Id.*

135. See *id.* at 806; see also *Town of Newton v. Rumery*, 480 U.S. 386, 397 (1987) (noting that according to tradition, most prosecutors will act according to their duty); compare *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (explaining that the burden is on the person asserting that the official went beyond the scope of her duty to produce clear and convincing evidence to overcome the presumption).

136. See William F. McDonald, *Plea Bargaining: Critical Issues and Common Practices*, 1985 NAT'L INST. JUST. 1, 49. The report contains findings resulting from surveys taken in prosecutors' offices across the country. The author notes that the most surprising aspect of the prosecutors' actions was the scenario in which the prosecutor utilized bluffing to obtain convictions which were not warranted, described as "no case at all, hopeless [or] effectively unconvictable." *Id.*

137. See *id.* at 49-50 n.3. Data reflected in the report was collected from Indianapolis, the District of Columbia, Detroit, Los Angeles, New Orleans, El Paso, Seattle, Tucson, Norfolk and Delaware County. See *id.* at 49-50 n.3, 56-57.

138. See *id.* at 51. The author distinguishes apparently strong cases which become weak because of discovery of further evidence, from those that become weak due to "administrative" failures.

139. See *id.* The method of the assertion and degree of deceptiveness varied from case to case. The methods employed "varie[d] widely from the mild puffery of an offhand remark, such as 'We've got the goods on your client,' to much more elaborate frauds." *Id.*

140. See *id.* at 59. The extent of the bluffing each attorney engaged in was a function of many variables, including local norms and customs, the amount of risk and strength of the circumstantial evidence, and the code of professional conduct. See *id.*

141. See Brief for Respondent at 33, *Mezzanatto* (No. 93-1340) "With the government's understanding, [Mezzanatto] came to the plea-discussion meeting with the hope of a receiving a reduced sentence in exchange for providing the government with helpful information about other people involved in drug trafficking." *Id.*

several questions about Mezzanatto's activities but did not expand the inquiry to other's activities before terminating the discussion for alleged untruthfulness.¹⁴² Mezzanatto, having waived his rights, was unable to effectively respond to the prosecutor's questions in a manner which could enhance his position yet not incriminate himself.¹⁴³ The benefit resulting from the prosecutor's bluff was that Mezzanatto provided testimony which could be used against him for impeachment at his trial, while the prosecutor made no offer.¹⁴⁴

Bluffing and other deceptive practices are not, however, in themselves ethically repugnant for either the prosecutor or the defendant.¹⁴⁵ The nature of the plea bargain as a judicially unmonitored activity demands that the parties determine and maintain their own ethics particular to the plea negotiation undertaken.¹⁴⁶ Further, the use of "quasi-ethical" bargaining techniques, including the limited presentation of false information, is a beneficial method to obtain even more information.¹⁴⁷ The use of techniques such as avoiding direct answers, failing to volunteer information, puffing, and bluffing are actually instrumental in obtaining truthful information.¹⁴⁸

D. The Significant Disadvantage of "Handcuffing" the Defendant

The Supreme Court's decision to allow a waiver of the protection against future use of the defendant's plea negotiation statements in federal court effectively denies the defendant the ability to respond to strategic negotiation tactics routinely employed by the prosecutors. When a defendant is compelled to waive the protective rules by signing a standard form proffer letter, the government has constrained the defendant's ability to enhance his or her "worth" to the prosecutor through the common and necessary techniques of puffing and bluffing.¹⁴⁹ Compounded with the inherent disparity of bargaining power which exists when the individual defendant negotiates with the prosecutor, the effect of the limitations imposed can create a virtual interrogation, as the defendant would be hesitant to withdraw from the discussion fearing her truthful, yet

142. *See id.*; *see also* United States v. Mezzanatto, 115 S. Ct. 797, 800 (1995) (describing the information which Mezzanatto conveyed to the prosecutor).

143. *See Mezzanatto*, 115 S. Ct. at 800.

144. *See* Brief for Respondent at 33, *Mezzanatto* (No. 93-1340). "Rather than terminate the meeting at that point, however, the prosecutor . . . repeatedly confronted [Mezzanatto] with his untruthful statements . . . [w]ith each response, the government gained new incriminating information." *Id.*

145. *See generally* Norton, *supra* note 122, at 545. The use of some form of deception is a requirement for certain types of bargaining to work. "[M]any forms of deception in bargaining are themselves bargaining techniques which are addressed and countered by the bargaining techniques of opponents." *Id.*

146. *See generally id.* at 530. The adversarial nature of the negotiation provides benefits to the process. "This [adversarial] posture facilitates the search for truthful information, helps guard against injurious disclosures, and helps prevent treatment that could prejudice a party's interests." *Id.*

147. *See id.* at 535-36. If the false information is determined to be "information that is necessary for bargaining to occur . . . [it] does not threaten the validity of an agreement because it may be uncovered during the course of bargaining through the use of bargaining techniques so as to facilitate the eventual discovery of more accurate information." *Id.*

148. *See id.* at 536.

149. *See* Hughes, *supra* note 90, at 37. "A sliding scale of benefits is eminently likely to egg the cooperators on to greater efforts." *Id.*

damaging statements could then be used against her at trial. Not only is the defendant denied bargaining techniques such as bluffing which are used so extensively by prosecutors, but the government may be denied the most useful information the defendant has to offer, those statements which might incriminate her and provide critical information regarding other criminal activity.¹⁵⁰

VII. CONCLUSION

Although the United States Supreme Court in *Mezzanatto* upheld the validity of the plea-statement waiver, it must be recognized that the criminal defendant, who is to be presumed innocent until proven guilty, can now be placed in a position in which the rule specifically protecting the quality of the plea negotiation is subject to a compelled waiver. The effect of the compelled waiver may have a negligible effect upon the quantifiable percentage of cases resolved through plea bargaining. However, the actual impact of this holding will have a more insidious effect on the integrity of the judicial process. The current process of plea negotiations places disproportionate power in the hands of the prosecutors who are under pressure to respond to demanding case loads. The compelled waiver of the protection against use of a defendant's statements for impeachment will further limit the "innocent" defendant's ability to respond within the accepted norms of negotiation practices. The resultant loss of protection will limit the benefits that society can obtain through the uninhibited exchange of information, as well as the defendant's ability to equalize the power distribution and negotiate an equitable agreement. With the Court's majority clearly standing in support of the "right" of the party to waive this protection, negotiated settlement will not be enhanced, rather the waiver will be coerced, and only another case resulting in a bright line rule against waiver will restore the now effectively nonexistent protection for the individual defendant.

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150. See Brief for Respondent at 24, *Mezzanatto* (No. 93-1340). The cooperator's statements are "[I]nformation bearing the most indicia of reliability . . . [t]hus the most helpful proffer is necessarily that which incriminates or implicates the defendant in the suspected criminal activity." *Id.*; see also *United States v. Mezzanatto*, 998 F.2d 1452, 1455 (9th Cir. 1993), *rev'd*, 115 S. Ct. 797 (1995) ("Frequently only by such cooperation can the organizers of the conspiracy, the higher-ups, be identified and prosecuted.").

